IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7109 OF 2004

Lahu Rama Bhoir & Ors... ....Petitioners
V/s
Hiraman Bama Bhoir & Ors..... ....Respondents.

Mr.B.G.Tangsali, Adv. For the petitioners.

Mr.Ajay A. Joshi, Adv. For R.No.1(a) to 1(c), 1(d) A to 1(d)F, 2(a) to 2(c) and 3 to 6.

CORAM: A.P.DESHPANDE, J.
8/8/07

PC:

The matter is heard finally by consent of parties.

The present respondents instituted a suit for declaration that the original defendants/petitioners have no right in the suit property. The suit so instituted by the respondents came to be dismissed by the trial Court. Aggrieved by dismissal of the suit the respondents preferred a reguarl civil appeal bearing No.102/95. IN the said appeal the respondents/original plaintiffs filed an application under order XXIII of Code of Civil Procedure seeking leave to withdraw the suit with liberty to institute a fresh suit on the same cause of action. The First Appellate Court granted permission to withdraw the appeal (suit) with liberty to institute fresh suit in respect of subject matter of the suit. The order granting permission under sub-rule 3 of rule 1 of the Order XXIII has been challenged by filing present writ petition.

2. Learned counsel for the respondent/appellant before the First

Appellate Court in whose favour the impugned order had been passed concedes that the impugned order is unsustainable in law and thus submits that the impugned order may be quashed and the present respondents be permitted to prosecute the appeal on merit. Learned counsel for the petitioner has no objection for disposal of the petition on concession extended by the learned counsel for the respondent. As the impugned order passed under sub-rule 3 of rule 1 of Order XXIII is to be set aside the effect of the setting aside of the said order would be restoration of the appeal on the file of First Appellate Court which the respondents propose to prosecute. Hence present writ petition is allowed. The impugned order dated 19.1.1998 passed by the Additional District Judge , Alibag at Ex.E is quashed and set aside on account of which the appeal stands restored to file. The First Appellate Court shall proceed to decide the appeal on merit. Rule made absolute in above terms.

8.8.07